

Allied Riggers, Inc. and Robert Lee Murray. Case 9-CA-18903

27 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 31 August 1983 Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Allied Riggers, Inc., Columbus, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act."

2. Substitute the following for paragraph 2(a).

(a) Offer Robert Lee Murray immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision."

3. Insert the following as paragraph 2(b) and re-letter the subsequent paragraphs.

"(b) Remove from its files any reference to the unlawful 'refusal to recall' and notify the employee in writing that this has been done and that it will not be used against him in any way."

¹ No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(1) by refusing to recall Murray.

² In compliance proceedings, the Respondent may present evidence that when the project for which Robert Lee Murray was hired ended, the Respondent did not retain, transfer, or rehire project employees for other or subsequent projects. Accordingly, compliance proceedings herein will accurately determine the Respondent's backpay and reinstatement obligations to the discriminatee.

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to recall or otherwise deny employment to employees because they engage in, or have engaged in, protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed to you by Section 7 of the Act.

WE WILL offer to Robert Lee Murray immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for any loss of earnings he may have suffered, less any interim earnings, plus interest.

WE WILL notify Robert Lee Murray that we have removed from our files any reference to our refusal to recall him and that the same will not be used against him in any way.

ALLIED RIGGERS, INC.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge: This case was tried before me on April 11 and 12, 1983, at Columbus, Ohio. The charge was filed on November 3, 1982,¹ by Robert Lee Murray, an Individual. The complaint issued December 16 and alleges that Allied Riggers, Inc., herein called the Respondent, violated Section 8(a)(1) of the National Labor Relations Act, as amended, by failing and refusing to recall Murray because he engaged in protected concerted activities when he and other employees of the Respondent complained concerning other employees doing the work assigned to their crafts. In its answer the Respondent denies the commission of any unfair labor practices.

All parties were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. Briefs were duly filed. On the entire record, my observation of the demeanor of the

¹ All dates are in 1982 unless otherwise indicated.

witnesses, and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, an Ohio corporation, is engaged in the business of machinery moving and erection at its Columbus, Ohio facility. During the past 12 months, a representative period, the Respondent, in the course and conduct of its operations, performed services valued in excess of \$50,000 for other nonretail enterprises within the State of Ohio,² each of which, in turn, annually purchased and received goods and services valued in excess of \$50,000 directly from outside the State of Ohio or which were otherwise engaged directly in interstate commerce.³ The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.⁴

II. THE LABOR ORGANIZATION INVOLVED

Millwrights and Piledrivers Local Union No. 1241, United Brotherhood of Carpenters and Joiners of America, herein called the Union, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.⁵

III. THE ALLEGED UNFAIR LABOR PRACTICES

Allied Riggers, Inc., is an employer member of Central Ohio Division, Ohio Building Chapter Associated General Contractors of America, Inc., and, as such, is signatory to a collective-bargaining agreement with Capital District Council, United Brotherhood of Carpenters and Joiners of America, Inc., AFL-CIO, which provides that millwright employees of the employer be assigned certain specified work. On May 18 the Respondent undertook work on a project at the Columbus Trash Burning Power Plant. In preparation for the work, Robert Landry, the Respondent's superintendent, personally contacted Robert Murray, a millwright who had previously worked with Landry and who had had experience in the type of work to be undertaken, and offered him employment. Landry told Murray that the Respondent had been well satisfied with Murray's work on the previous job and with the fact that he knew what he was doing and seemed to get along well with Daniel Naegele who was scheduled to become the general foreman on the new job. Murray stated that he was already working elsewhere but Landry pursued the subject by suggesting that Murray request dismissal at his other job and accept work with the Respondent. The following day Landry called again to persuade Murray to come to work for the Respondent and when Murray accepted the offer Landry asked him if he could recommend another millwright

with whom he would like to work as partners. Murray recommended one Joe Teeters, another millwright, and Landry subsequently hired Teeters as well.

On the first day on the job Murray was told by Landry that he was to work both with and for Naegele. The work consisted mainly of loading and unloading equipment in preparation for the installation of quench basins, a job at which Murray was experienced and at which Naegele was not. Both men also worked with blueprints. A few days later Naegele was made general foreman and thereafter Murray worked with Teeters, the millwright steward, and with Fred Weaver, the ironworkers steward, as a threesome. The nature of the work was a mixture of millwrights' work and ironworkers' work so that it was agreed that the two trades would work as a composite team sharing all of the work usually performed separately by the two trades.

After the equipment was unloaded at the site, the job consisted of hoisting the quench basins and installing them 20 feet above the ground. To accomplish this, Teeters and Weaver worked above the quench basins, welding and fitting while Murray worked below on the ground throwing the tools up to the other two and managing the hoist.

On the first day, after the quench basins were unloaded, Murray noticed the stepson of Thomas Marshall, president, general manager, and sole owner of the Respondent, shaking out material⁶ and moving valves around, work which under the contract and the agreement for composite work belonged to the ironworkers and millwrights. Marshall's stepson, Dave, was a member of the operating engineers and ordinarily operated the forklift. He was neither a millwright nor an ironworker.

Upon noticing Dave doing the unit work, Murray, during the first few days of the job, brought the subject to the attention of the rest of the crew. Naegele agreed with Murray that Marshall's stepson should not be doing unit work but said that it was company policy and that small companies worked that way on small jobs in order to keep everyone working and make a profit. Murray agreed but added that on a job such as this where there were between 400 and 500 men working it should not be permitted because there are too many union men around who might start talking and perhaps bring charges against them for working with noncraft people who are doing the craft's work. Naegele agreed and said that he would mention the problem to Marshall but added that Marshall would do what he wanted to do because it was his company and would insist on running things his own way. Later Naegele reported back that he had mentioned the problem to Marshall and had even tried to get Dave transferred to another job to eliminate the problem but to no avail.

Thereafter, Marshall's stepson continued to perform unit work and Murray and the other members of the crew continued to discuss the matter during lunch and coffeebreaks,⁷ Murray bringing the problem to the atten-

² Stone & Webster, et al. Stipulated at the hearing.

³ *Electrical Workers Local 401 (Stone & Webster Engineering Corp.)*, 251 NLRB 321 (1980); *Plumbers Local 195 (Stone & Webster Engineering Corp.)*, 240 NLRB 504 (1979); and *Stone & Webster Engineering Corp.*, 220 NLRB 905 (1975).

⁴ Admitted at the hearing.

⁵ Ibid.

⁶ Shaking out is the term used to describe the job of unloading parts, checking their numbers, and sorting them out in accordance with their order of installation by location.

⁷ Naegele testified that the subject was only brought to his attention once but I credit Murray's testimony as it appears above.

tion of the stewards who, being aloft, could not see Dave doing the unit work as well as Murray could. Murray reported the problem to the stewards several times. On at least three occasions, when Weaver saw or heard that Dave was doing unit work, he would go over to him and tell him to stop and then report the problem to Naegele. On these occasions Naegele would tell Weaver that he would bring the problem to Marshall's attention but note that it probably would not do any good. He added that Dave was only temporarily acting as a fill-in man and that he planned to hire another full-time man in a day or so. Teeters too complained to Naegele after having the problem brought to his attention by Murray and after two or three times seeing for himself Dave performing unit work such as sorting parts. He spoke to Naegele two or three times and Naegele promised to take care of it.

After the stewards complained to Naegele about Dave doing unit work, Naegele brought the problem to Landry's attention. Landry told Naegele to take care of the matter himself since he, Landry, was busy with other problems. Dave nevertheless continued to do unit work.

Meanwhile, on the second day of the job, Murray personally confronted Marshall's stepson and asked him what he was doing shaking out the unit material. Dave replied that he had been assigned to do it. When Murray asked him if he had a union card, Dave replied that he had an operating engineer's card which his father had gotten for him. Murray then stated that he should then be operating the forklift truck, not doing millwrights' and ironworkers' work. Dave replied that he had been instructed to do the disputed work by his father. He added, "He owns this company and what he says, goes, and it's our standard policy for me to work." Following this initial discussion between Murray and Dave several additional conversations took place along similar lines.

On the second day of work while the crew was operating the chain falls, Dave came over and fell in with the crew pulling the chain falls right with the others. Operation of the hoist, the pulling of the chain falls by hand, is strictly unit work and according to the agreement should have been performed only by millwrights and ironworkers. Again, Murray complained to Naegele.

On about the fourth day of the job, Ron Sparks, the millwrights business agent, happened to visit the jobsite. Murray took the occasion to advise Sparks that Marshall's son was doing unit work and to ask him if he had given permission for him to do so. Sparks denied that Dave had been given such permission and promised to take care of the problem. He added that it was Teeters' job to take care of such matters and advised Murray not to get involved. Nevertheless, thereafter, when Murray saw Dave doing unit work, he did not discuss it personally with him but did complain about it to Naegele.

Toward the end of the first week on the job, when Weaver noticed that Dave continued to do unit work and Naegele did not hire the additional ironworkers as he had promised, he confronted Naegele once again. Naegele explained that the Respondent still intended to put on another man and that when it did it would no longer have to use Dave. Weaver commented that he thought that the matter was getting a little out of hand

but agreed to go along with Naegele once again. Subsequently, Weaver advised his business agent about the problem and was told not to permit Dave to continue to do the unit work.

Later in the first week Naegele was promoted officially to superintendent, so advised the other workers and told them that he was 100 percent in charge of the job. He said that if they had any problems they should take them to him. About this time he stopped working with the rank-and-file employees and additional men were hired to perform his work as well as other tasks. Despite the hiring of additional employees Dave continued doing unit work and Murray continued reporting it to the stewards.

About this time, Landry made one of his occasional visits to the site. While there he asked Murray how the job was going. Murray replied that the work was going along fine but that Marshall's son was creating quite a problem among the men and the stewards and that if the size of the crew were going to be increased as expected the problem would get worse because the men would not tolerate "this kid climbing off of that fork truck and doing our work." Landry replied that it was Marshall's policy that every man on the job worked and "that he couldn't stand to see anybody on a fork truck for four hours and do nothing." He added that Murray and the others would just have to live with it and otherwise made it clear that he could do nothing about the situation.

About the fourth or fifth day into the job Marshall's stepson told him that Murray was upset about his doing unit work. Nothing was done, however, at that time, because, Marshall testified, he did not consider the issue important. Nevertheless, Marshall also testified that it was about the fifth day of the job that Landry came to him and advised him that he was going to terminate Murray.

One day, during the second week of the job, Murray, Landry, and Marshall were coming toward the worksite from the storage area when Murray again noticed Marshall's son shaking out bolts and other parts. Murray commented to Marshall, "Tom, that's what's keeping the dissension on the job and creating turmoil and the problem with the men. The boy's doing our work and its going to have to stop because these stewards are not going to allow it." Marshall made a disagreeable face, according to Murray, but then said he would take care of it. He then went over to speak to Naegele who, in turn, walked over to Marshall's son who thereupon stopped what he was doing.⁸

May 28 was the expiration date of the Respondent's contract with the ironworkers union. The membership was scheduled to vote on the new contract that evening. If it rejected the Association's latest offer, a strike would result. Inasmuch as the millwright union's contract was to continue in effect, the millwrights were not going out on strike. On the other hand, since the previous arrangement, the millwrights could not work the job alone. It

⁸ Marshall reluctantly conceded that this incident occurred as described above in Murray's testimony.

was therefore arranged that the millwrights would be laid off until the ironworkers' strike was over at which time all employees would return to the job.⁹

On May 28 Weaver was working aloft and, having become somewhat irritated at Marshall's son continuing to perform unit work, he asked Murray to let him know if he saw Dave doing unit work. Dave, as had been his practice, at one point began shaking out parts by order of his father. Murray observed him doing this and advised Weaver. Later, Weaver came down and saw for himself that Marshall's son was, in fact, engaged in performing unit work. Weaver became angry. He went over to Marshall's son and asked him what he was doing unloading the material. Dave replied that it was "none of his damned business" but added that he had been told to do it. Weaver replied, "Well, I told you to get off of it before, and I'm telling you again. I want you off of it!" Dave replied, "I don't give a damn what you want! My dad told me to do it and I'm going to do it!" Thereupon, Weaver went over to where Marshall was standing and told him that his son was doing unit work again and that it had to stop. In a raised voice he told Marshall, "I've told Danny Naegele numerous times and now I'm telling you." Marshall replied that he could not believe that Weaver would actually bitch over such a little thing. He added, "You're trying to be pricks with me, but if that's what you want, I'll take him off of it." Weaver turned away, walked over to Naegele, and told him that he did not want to see the operator doing unit work anymore, that he was putting a stop to it right then. Marshall then took his son off the shake out job and told Weaver to have his men do the work. While Weaver, Teeters, and Murray unloaded the box and proceeded to shake out the parts, Marshall went over to speak to Naegele and said, "If they're going to play it by the book, we're going to play it by the book." He told Naegele that work rules which had been rather lax before would be tightened up so that the starting time would thereafter be 7:30 a.m.; lunch would be 11:30 to 12 noon; there would be no more coffeebreaks in the afternoon;¹⁰ and quitting time would be 4 p.m.¹¹ He added that the first man to leave before 4 p.m. would be terminated with no exceptions.

Naegele shortly afterwards came over to where Murray, Teeters, and Weaver were working and said, "Well, you guys have really done it now. Tom says that [if] you guys are going to be pricks with him, he's going to be a prick with you. You're complaining about his son working and he's not going to tolerate it. So if his son don't work, from now on we're going to be 100 percent by the book around here. There'll be no more [afternoon] coffee breaks. There'll be no more early quits. Anyone caught bullshitting or coming in a minute late or doing anything wrong will be fired immediately. This is effective immediately and I want you to notify all the

men." Teeters replied that he had not done anything wrong, that he had been doing this job and giving the Respondent an honest day's work and would therefore continue to take his coffeebreaks and do as he had been doing, adding that, if the Respondent wanted to fire him for it, it could go ahead and do it. Weaver added that if Marshall wanted to run the job by the book it was fine with him.

At 3:45 p.m. on May 28 the employees started picking up their tools and putting them in the gang box just as they usually did. The employees of other companies were leaving, heading toward their cars. However, Marshall was standing by the gang box and said to Murray, referring to Weaver, "If that man walks out the door, he's fired." Weaver, who was already half way to the door, continued on out and Marshall stated, "That's it, he's fired. I said 4:00 and I mean 4:00 for everybody. If you guys are going to be pricks with me, I'm going to be a prick. I've never been one before, but I've had enough of this shit. Now this is the way it's going to be from now on until you guys get in line." At this point Marshall noted that Teeters was missing and asked where he was. Naegele then informed Marshall that Teeters had asked for and had been granted special permission to leave early. Marshall said that, in that case, it was all right. Murray and the other employees waited around past 10 minutes til 4 until about 1 minute til 4 at which time Marshall nodded and Murray and the other employees started for the door and headed for their cars.

Marshall and Murray walked together toward their cars. During the walk Marshall explained to Murray that the reason he was enforcing the rules more strictly was because he felt that it was completely wrong for the Union to press such a small point by interfering with his son working. He explained that it was necessary for a small company to work everybody on the job every minute, that everybody had to produce in order for him to make a living. He added that it was his company and that he had to keep control over it. Murray agreed that Marshall was 100 percent correct where jobs with only one or two employees were concerned. He argued, however, that this job was too large, that with as many men as there were around he could not agree with Marshall. He told Marshall that he was wrong to force the issue because the stewards had to stand up for the Union because there were too many people around and they could not get away with ignoring the union rules. Later that day, Marshall called the ironworkers' business agent and informed him that he did not want Weaver back on the job.

On the evening of May 28, the ironworkers voted to reject the Association's proposed contract, went on strike, and so as it turned out May 28 was the last day of work for the Respondent's employees at the Columbus Trash Burning Power Plant site. At the union hall where the vote took place, Weaver was informed by Naegele that he had been fired. Weaver had known nothing about this termination and asked Naegele why he had been fired. Naegele replied that he thought it was because Weaver had gone outside the chain of command when he complained directly to Marshall rather than to Nae-

⁹ This arrangement was made on the evening of May 28 following the ironworkers strike vote.

¹⁰ No afternoon coffeebreaks were provided for by the contract.

¹¹ The Respondent's employees had previously been permitted, as a rule, to quit 10 to 20 minutes early. Naegele had previously given his permission to Teeters to leave early provided he had given a good day's work.

gele that his son was doing unit work. According to Naegele, Weaver was supposed to have first brought his complaint to Naegele's attention and his failure to do so was the reason for his discharge.¹²

In accordance with prior arrangements made with the millwrights' business agent, on the evening of May 28, the Respondent's millwright employees were sent layoff notices so that they could draw unemployment benefits. Murray, however, was sent a letter advising him that his layoff should be considered permanent. Landry testified that the decision not to rehire Murray was his own although it was discussed with and approved by Marshall. He stated that the decision had nothing to do with Murray's complaining about Marshall's son doing unit work.

Sometime during the next 2 weeks a new contract was executed with the ironworkers and the Respondent called back its ironworker and millwright employees to the Columbus Trash Burning Power Plant site and to various other jobsites where it had construction in progress. Though some of the millwrights and ironworkers previously working at the trash burning plant site were recalled to their previous jobs, Murray was not recalled at all and Weaver was recalled but sent to a different jobsite.¹³ Marshall, in testifying concerning the decision not to recall Weaver to his previous job, simply stated, "I didn't feel he belonged on that job, which is my prerogative."

When Naegele called up the hiring hall to recall certain millwrights, Sparks noted that Murray was not being recalled and asked why not. Naegele said that he did not know. Subsequently, Sparks had occasion to discuss the subject with Marshall. Marshall gave no definite reason to Sparks for not recalling Murray except to say, "I'd rather not have him on the job. We don't want to recall him." Sparks did not pursue the subject except to caution Marshall that it would be in his best interest to call him back because he expected that Murray might file charges with the NLRB. Sparks made this statement because he was aware that Murray had, on previous occasions, filed charges both with the Board and with the Union based on circumstances not here involved.

In mid-June Murray learned that the trash burning plant job had started up again. He called Sparks in order to determine if what he had heard was true. Sparks told him it was. Murray, despite the fact that he had received the permanent layoff notice in early June, still believed that he was going to be called back, that the notice was merely a matter of form and that everyone had received a similar notice. Murray asked Sparks what was going on. Sparks replied that the Respondent had decided not to recall him and that he had already been replaced. He added that he had not been given any reason for the Respondent's failure to recall Murray.

When Teeters was recalled to the trash plant job, he asked Naegele why Murray had not been recalled. Nae-

gele replied that he did not know,¹⁴ but that it had not been his decision. Teeters told Naegele that, in his opinion, Murray should have been recalled.

After Murray learned that the trash plant job had been started up again, he called Naegele. Naegele confirmed that the job had been going for about 2 weeks at the time of Murray's call. Murray asked why he had not been recalled. Naegele replied that he did not have anything to do with the decision not to recall Murray and did not know "a whole lot about it," but added, "They¹⁵ told me that they fired you for agitating up the stewards about his son." Murray denied the accusation, Naegele explained, "They feel that you were responsible, that if you hadn't been there . . . and agitating 'em or putting 'em up to it, that the stewards would have been willing to let it slide and that's the reason that you were discharged You were agitating and keeping the stewards riled up and keeping turmoil on the job. So therefore, they decided to terminate you and the ironworker steward If you guys hadn't raised Cain about his son, you wouldn't have been fired. You'd still be there." Murray then asked if there had been any complaint about his work. Naegele replied, "Nope, you were, in my opinion . . . you were the best man on the job. You were a great help to me There was absolutely no complaint about your work or anything. You done quality work."¹⁶ Murray asked Naegele to see what he could do about getting his job back and Naegele agreed to talk to Marshall about it and to call back in a couple of days.

When Naegele failed to call back as he said he would, Murray called him a second time. Naegele, on this occasion, told Murray that Marshall would not take him back. Murray said that there had to be a reason why he was not recalled other than his part in keeping Marshall's son from doing unit work. Naegele replied that "they also thought that you were undermining me." Naegele added that he did not believe this was the case but that "they said you were making suggestions and stuff on how to run the job and how to expedite the job and that that was my prerogative as superintendent and therefore you were undermining me."¹⁷ Murray then reminded Naegele that he, Landry, had asked Murray to help him with suggestions because of Murray's experience and his own lack thereof. Naegele agreed. There was some repetition of the first telephone conversation whereby Naegele informed Murray that the Respondent's failure to recall him was based on his "agitating the stewards to go

¹⁴ I found Teeters' testimony on this subject somewhat evasive and lacking in candor.

¹⁵ Naegele mentioned to Murray having had conversations on the subject with both Marshall and Landry.

¹⁶ The description of the telephone conversations between Naegele and Murray appear as credibly described by Murray. Naegele's denials are not credited and, where his description of the content of these several phone calls differs from that of Murray, his testimony is rejected in favor of that of Murray. Naegele admitted to having a poor memory with regard to these conversations.

¹⁷ Naegele testified that his conversation with Murray concerning his undermining his position occurred after Naegele talked with Landry about Murray's possible recall. Naegele testified that, when he asked Landry why Murray had not been recalled, Landry told him that it was because Murray was trying to cut Naegele's throat by trying to take his job.

¹² Both Marshall and Naegele were present within a few yards of each other when the incident occurred. I reject Naegele's explanation as to the reason for the termination and find that it was because he tried to keep Marshall's son from doing unit work.

¹³ Weaver was sent to the Buckeye Steel construction site, a job which started up on the same day that other employees were called back to the trash plant job.

to the company and . . . raise hell to . . . keep that boy off the work." Naegele also suggested that Sparks may have had something to do with Murray not being recalled but admitted that he had no proof.¹⁸

In mid-July there was still a third telephone conversation between Naegele and Murray during which the content of the first two conversations was reiterated. Naegele told Murray that it just boiled down to his and Weaver's complaining about Marshall's son doing unit work. He said that Murray had really alienated Marshall against him and that Murray would probably never get to work for him again as a result of it. Naegele stated that if it had been up to him Murray would not have been terminated because he had no complaints with Murray, his work, or his character. He said that in his opinion Murray had gotten a raw deal. After this third conversation between Murray and Naegele there were no further contacts between Murray and any member of the Respondent's management. Although Murray, several occasions thereafter, tried to contact Naegele to discuss the problem further, Naegele could not or would not take the call and Murray gave up trying.

The Defense

The Respondent takes the position that the decision not to recall Murray was made by Landry. Landry testified that his decision had nothing to do with Murray's complaining about Marshall's son doing unit work. Rather, he testified, that the decision was made to let Murray go early in the second week of the job, although he had been thinking about it earlier, and that it was based on several discussions between Landry and Murray during which Murray complained to Landry about Naegele's ability to run the job. According to Landry, on these occasions Murray would say that if Landry would let Murray run the job he could do the job faster and make the Company more money. In reply, Landry testified, he would tell Murray that the way Naegele was doing the job was the way Landry had told him to do it and that Murray should not complain. Landry stated that similar incidents occurred perhaps eight times during the first 4 days on the job.

According to Landry's testimony, on May 27, the day before the strike, as he and Marshall were leaving the jobsite walking toward their cars, Murray was walking behind them and almost with them. During this walk Murray once again stated how much faster he could do the job if Naegele would just listen to him or if he, Murray, had more say over the job. Landry replied that Naegele was doing the job the way he was told to do it and that he did not want to hear any more complaints. He added that he had hired Murray to help Naegele, not to complain about him. Landry pointed out, on this occasion, that he would make the decision on how to run and rig the job. Landry acknowledged, in his testimony, that hoisting the quench basins into place had been a tough job but that the means of accomplishing the job had been decided on by Marshall and himself. He testified that he wanted the job done as they had planned it

and was afraid that Murray's complaining would interfere with accomplishing this objective. He testified further that Murray's continued complaining was the basis for his decision to let him go. Though Landry testified that Murray stated on numerous occasions that he could do the job faster and cheaper his own way, he conceded that Murray never said that he wanted Naegele's job. Nevertheless, when it appeared that the ironworkers would be going on strike and the millwrights would be laid off, it was decided that Murray should not be recalled because, in Landry's judgment, the job could not get done properly with Murray's constant complaining.

On cross-examination Landry was asked whether any employees complained to him about Murray's performance on the job. He conceded that they had not. He was then asked if any of the employees had complained that Murray had not been cooperating with Naegele. Again, Landry admitted that there had been no such complaints. He was then questioned as to whether Naegele had ever complained to him about Murray failing or refusing to cooperate with him. Landry replied in the negative.

The Respondent called Marshall to testify in support of Landry as to the reasons for the Respondent's failure to recall Murray. Marshall testified that Murray approached him a couple of times and stated that if he would let him handle "this job" he could make more money for the Company. By this statement Marshall understood Murray to mean that because of his experience he could run a job faster than Naegele could. Marshall admitted, however, that Murray never mentioned Naegele by name during these discussions. In addition to two times that Marshall could remember Murray making such statements, he also testified to recalling the incident recounted by Landry which Landry reported as having occurred on May 27. Marshall, though agreeing with the facts as described by Landry, placed the incident somewhat earlier, perhaps on the fourth, fifth, or sixth day of the job and testified that Landry had told him that he was having problems with Murray in the sense that he felt that Murray wanted the job of general foreman. Somewhat later, Monday or Tuesday of the second week, according to Marshall, Landry told Marshall that he thought that he was going to have to fire Murray, to which Marshall rejoined that it was Landry's business. Supposedly, Marshall then asked on what basis and Landry replied that he thought that Murray was undermining Naegele by not cooperating with him. Marshall testified that he and Landry, at this time, discussed briefly laying off Murray the forthcoming Wednesday, the day the pay period ended, but decided to wait 2 more days when the ironworkers were expected to strike at which time they could lay him off along with the other millwrights and simply not recall him. Marshall explained that in a strike situation the millwrights would not be entitled to unemployment compensation but if they were laid off they would receive such benefits. He testified that Landry had come to him early in the week and told him that Sparks had called from the millwrights' union hall and asked Landry if he would mind laying off the millwrights since they had not been working much lately so that they could draw unemployment

¹⁸ Record evidence indicates differences had occurred in the past between Sparks and Murray.

benefits. Marshall testified that he would have no objection to granting Sparks' request.

At first glance Marshall's description of the sequence of events would seem plausibly credible. However, Landry testified as follows:

Q. And would it be safe to say that it's that same reasoning you just described which led you not to recall Mr. Murray when you recalled everyone else?

A. I was—at that particular night, I wasn't sure how I was going to do it. Until Friday after the vote for the ironworkers to go on strike,¹⁹ and Ron Sparks called me and asked me, he said, "You know, these millwrights have been laid off and they haven't been working very long, how's chances on laying 'em off?"

Q. As opposed to firing them?

A. As opposed to them being off work because of the strike.

Q. Oh.

A. And I guess the thought come to my mind right then, well, this is the perfect time. So yes, I said, "I will talk to Tom, but I'm sure we can do this."

So I talked with Tom and we decided to lay everybody—all the millwrights off, so they could draw Unemployment, and with Bobby, we sent him a letter to consider this as a permanent layoff.

Thus, there exists a serious discrepancy between the testimony of Marshall who places Sparks' call on or before Wednesday, May 26, and that of Landry who credibly established the call as occurring on the evening of May 28 after the strike vote. It strikes me as patently clear that Marshall, in an attempt to establish a pretext for terminating Murray before the events of May 28, testified to having relied on Sparks' request for a layoff of millwrights as justifying the decision to keep Murray on the payroll past Wednesday, the payroll closing date despite an earlier decision to lay him off. Landry's credited testimony that Sparks did not make his request and Landry and Marshall did not decide to grant the request until the night of May 28 clearly undermines Marshall's testimony that but for the strike the Respondent would have terminated Murray earlier and casts serious doubt as to his credibility although the Respondent's position contains other weaknesses as well. For example, Marshall admitted that no employees complained to him about Murray, his attitude, or his work performance and that Naegele did not complain about him either. It is difficult to believe that Landry and Naegele would terminate Murray for failure to cooperate with and for undermining Naegele when neither Naegele nor any other employee in the crew ever complained about such matters or brought them to the attention of upper management.

Naegele, the alleged victim of the purported lack of cooperation and undermining, testified that he never complained to either Landry or Marshall about Murray's work performance or about any supposed lack of coop-

eration on Murray's part. He also denied that he had any complaints in this regard which he did not pass on. He volunteered, "I'll be truthful with you. I had no qualms about the quality of the man's work." He added that he received no complaints from other employees about Murray's work performance or failure to follow his instructions. Naegele testified that Landry told him that every time Landry or Marshall came to the jobsite, Murray would complain that he could do the job better, faster, and cheaper and could make more money for the Company. He added, however, that he had never been advised of this charge until after Murray's termination.

With regard to the reasons for termination offered by the Respondent the record indicates that Murray was specifically sought out for hire by the Respondent because he had previous experience on jobs similar to the one at the trash plant, presumably because he could make suggestions as to how to get the job done. In line with the apparent desires of the Respondent's management, Murray did, in fact, make certain suggestions but he denied that he was ever openly critical of the work being done by Naegele. On the contrary, he stated affirmatively on the record that there was nothing wrong with Naegele's work and that he never complained to either Landry or Marshall as to how he got the job done. Specifically, he denied ever stating that he could do the job faster and make more money but admitted that in discussing certain segments of the job he advised Marshall that it should have been done differently. In particular, Murray testified to an incident wherein Naegele insisted on using a thinner cable and Murray advised that a thicker cable was required. When the thinner cable snapped, Murray was reprimanded but pointed out to Marshall that it was not his decision to make and he could not override Naegele. At that time he told Marshall that he would have used a heavier cable, that it was silly to use the smaller cable, and that the error was due to Naegele's inexperience. On another occasion Murray suggested that certain parts be assembled on the ground and hoisted up as a unit rather than constructed aloft. Naegele adopted this suggestion which resulted in the saving of a great deal of time. Naegele complimented Murray for the suggestion.

As to suggestions in general, Murray testified that he had, in fact, made suggestions to Naegele because they were working together as a team. He credibly maintained, however, that the suggestions were made to Naegele alone, in the course of their work as a two-man crew, not to Landry. Such suggestions were usually made during a general discussion as to how to get the job done and came from Murray on some occasions and from Naegele on others. When the employees were working in crews of three or four according to Murray, everyone on the crew made suggestions as did members of management when they came by. Naegele never complained about suggestions offered and Naegele and Murray worked well together. Similarly, according to Murray, neither Marshall nor Landry ever criticized or reprimanded Murray for making suggestions. The testimony of Landry and Marshall notwithstanding, I credit Murray on this point.

¹⁹ May 28.

As far as other rank-and-file employees on the job, Teeters testified that he never criticized Murray's work to management and, in fact, never had reason to do so. He stated that Murray made certain suggestions on how certain jobs should be accomplished but added that he, himself, also made suggestions and that perhaps Weaver did as well. He testified that everyone put his two cents in, thus agreeing with Murray. He stated that he never heard Murray complain about the way Naegele was running the job nor suggest that he might be able to do as good a job or a better job than Naegele. Occasionally, Teeters admitted, Murray and/or he might disagree with the specific way Naegele wanted to do a job. On these occasions Naegele would inform them that management wanted the job done a certain way and so that was the way it had to be done.

Weaver testified that he never talked to Naegele, Landry, or Marshall about Murray's job performance or attitude on the job. He agreed with both Teeters and Murray that on numerous occasions all of the rank-and-file employees offered suggestions on how a particular task on the job should be done, always in Naegele's presence. He added that the crew, including himself, talked over various approaches to certain problems and that this was a matter of safety. He testified that he never heard Murray complain about how Naegele was running the job.

Conclusion

The record indicates that Murray, on a number of occasions, attempted to get management and the stewards on the job to keep Marshall's son from performing unit work. Similarly, it is clear from the record that Murray's efforts came to the attention of management. Likewise, the record indicates that Marshall, the Respondent's owner and chief officer, was extremely upset that Murray and Weaver insisted on enforcing the Union's rights under the contract and demonstrated his annoyance on May 28, the day of the layoff, by taking countermeasures against his employees in the form of discriminatory changes in working conditions. These factors plus the timing of the Respondent's refusal to recall Murray and Weaver to the trash plant job when it started up again convince me that its failure to recall these "troublemakers" was discriminatorily motivated.²⁰

Finally, I find the Respondent's position that it refused to recall Murray because he attempted to undermine Naegele as superintendent unsupported by the evidence, particularly in light of the discrepancies contained in the testimony of Respondent's own witnesses. I conclude that Respondent failed and refused to recall Robert Lee Murray in retaliation for his joining with other employees to complain about the assignment of unit work to nonunit employees in violation of Section 8(a)(1) of the Act.²¹

²⁰ Inasmuch as the failure to recall Weaver was not alleged in the complaint, I do not find a violation on that score but do find the discriminatory failure to recall Weaver to the job where Marshall's son was working supportive of the allegation concerning Murray.

²¹ *Interior Alterations*, 264 NLRB 677 (1982).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices violative of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully failed and refused to recall Robert Lee Murray, I shall recommend that the Respondent offer him immediate reinstatement to his former position or, if such job no longer exists, to a substantially equivalent position, without loss of seniority or other rights and privileges, discharging if necessary any replacement, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to the amount that he normally would have earned from the date he should have been recalled to the date which a bona fide offer of reinstatement is made, in accordance with the Board's formula as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).²²

CONCLUSIONS OF LAW

1. The Respondent is, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by failing and refusing to recall Robert Lee Murray in order to discourage employees from engaging in protected concerted activities, thus interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

3. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER²³

The Respondent, Allied Riggers, Inc., Columbus, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recall or otherwise deny employment to any employee because he engages in, or has engaged in, protected concerted activities.

²² See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

²³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is found necessary to effectuate the purposes of the Act.

(a) Offer to Robert Lee Murray immediate and full reinstatement to his former position, without prejudice to his seniority and other rights and privileges dismissing, if necessary, any replacement, and make him whole for any lost earnings resulting from the discrimination against him by payment of a sum determined in accordance with the formula set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its premises in Columbus, Ohio, copies of the attached notice marked "Appendix."²⁴ Copies of said notices, on forms provided by the Regional Director for Region 9, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

²⁴ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."